



THE COMMITTEE ON ENERGY AND COMMERCE

MEMORANDUM

May 31, 2012

To: Energy and Commerce Committee Republican Members

From: Majority Staff

Re: Investigation Update: Closed-Door Obamacare Negotiations

Executive Summary

- The White House negotiated a deal with the Pharmaceutical Research and Manufacturers of America (PhRMA) in mid-June 2009. After attempting to secure a commitment from the industry for \$100 billion in payment cuts, eventually the White House settled for approximately \$80 billion in payment reductions through expanded and increased Medicaid rebates and a new health reform fee. PhRMA also had direct input into the actual legislative policies that produced the \$80 billion, including the proposal for closing the Part D doughnut hole.
- Under the deal, “the White House and Senator Baucus agreed” that neither price controls nor a government-run Medicare Part D plan would become law, the White House would oppose price controls on dual eligible beneficiaries, and that savings from a follow-on biologics proposal would be applied to the total \$80 billion commitment.
- White House Office of Health Reform Director Nancy-Ann DeParle told PhRMA’s chief lobbyist for negotiating the deal that the White House would oppose new drug importation policies because of “how constructive” PhRMA had been. According to PhRMA’s lobbyist, White House Deputy Chief of Staff Jim Messina told him that the “WH is working on some very explicit language on importation to kill it in health reform.”
- According to internal e-mails, PhRMA’s chief lobbyist believed the White House eventually cut a deal with the pharmaceutical industry during the week of June 20, 2009, because the White House had suffered a bad week politically.
- Despite countless promises of televised negotiations and transparent government, the White House met in private with PhRMA representatives and drug company CEOs in July 2009, “to look the other side in the eye and shake their hand on whatever deal we work out.”

- The White House was not above threatening PhRMA to get its way. According to PhRMA's chief lobbyist, the White House was going to have President Obama call for rebating all of Medicare Part D, a policy PhRMA staunchly opposed, in his Weekly Radio Address unless PhRMA cut a deal with the White House to support health reform.

Overview

This memorandum updates Republican Members on the Energy and Commerce Committee on the Committee's ongoing investigation into the agreements made between the White House and health care industry stakeholders prior to passage of the Patient Protection and Affordable Care Act (PPACA). As reported on April 17 and May 16, 2012, the Committee's investigation seeks to answer the following questions:

- Were "deals" made between the Administration and outside stakeholders that exchanged specific policy outcomes for public support of the law?
- Who made these deals, and to what extent was Congress excluded?
- What specifically was negotiated by the White House and these outside interests? What policies are now law as a result of these negotiations, and what did the White House obtain in exchange?

This memorandum answers these questions. The Committee's investigation has uncovered the deal negotiated between the White House and the Pharmaceutical Research and Manufacturers of America (PhRMA), the full details of which have never been released to the public.

I. Major Negotiation Milestones

Documents obtained through the Committee's investigation show that throughout 2009 and in the early months of 2010, the White House engaged in a series of closed-door negotiations with various outside interest groups prior to PPACA becoming law on March 23, 2010. The majority of these negotiations took place between May and August of 2009, although the Administration's dialogue with special interest groups continued behind the scenes right up to passage of the law.

Of these negotiations, the deal with PhRMA was the most carefully orchestrated, with extensive communications between top PhRMA officials and key White House personnel. In fact, the White House made clear that PhRMA had a direct line of communication to White House personnel: "Rahm's calling Nancy Ann and knows Billy [Tauzin, PhRMA's President] is going to talk to Nancy Ann tonight. Rahm will make it clear that PhRMA needs a direct line of communication, separate and apart from any other coalition."¹ This direct line of

¹ E-mail from Jenny Murphy to Rebecca Walldorff (May 6, 2009, 00:10:58) (PhRMA Document Production 0002314).

communication was used by Bryant Hall, PhRMA's chief lobbyist, for negotiations with the White House and the Senate Finance Committee.

PhRMA and the White House frequently communicated directly. This Committee obtained thousands of pages of emails and documents between PhRMA personnel and the White House between April 2009 and March 2010.

Throughout the summer of 2009, as the deals were being negotiated, the media occasionally reported on the widespread confusion about what had been agreed to and when. One such incident, discussed in greater detail later in this memo, followed the White House announcement that six organizations had committed to reduce health care costs by \$2 trillion. Amid the resulting discord, PhRMA evidently saw its opening to strike a bargain with the White House, with its chief lobbyist remarking: "Perfect timing to cut our deal w the White House as this is swirling."² At that point, the negotiations progressed in earnest.

On June 10, 2009, representatives from PhRMA and its member companies met with White House Deputy Chief of Staff Jim Messina, Director of the White House Office of Health Reform Nancy-Ann DeParle, and top staffers from the Senate Finance Committee to hammer out specific details and "discuss the expected financial gain from health reform" and "the pay fors."³

At this meeting DeParle discussed a number of potential reforms affecting the pharmaceutical industry, including two that – if included in legislation – would be poison pills for PhRMA. The first policy was a 15 percent rebate on pharmaceuticals for all Medicare Part D enrollees, which the White House estimated would raise \$90 billion over 10 years. The second would make all direct-to-consumer (DTC) advertising non-deductible for tax purposes, which the White House estimated would raise \$10 billion.⁴ The impact of these White House policy threats had their intended effect – a week later PhRMA was ready to deal.

Seven days after the meeting with Messina, DeParle, and the top Senate Finance staffers, the President of PhRMA wrote to Messina that they were ready to agree to a deal: "Our five principal CEOs have accepted the terms discussed with the Committee yesterday, and we are prepared to recommend acceptance by the full Board tomorrow morning...I can assure you that we will deliver a final yes to you by morning."⁵

Three days later, the White House announced an agreement, but specifically referred to it as a deal between PhRMA and the Senate Finance Committee, leaving out any mention of White House involvement. As the Committee reported in its May 16, 2012, memorandum, emails obtained by the Committee indicate that a PhRMA representative believed that PhRMA had

² E-mail from Bryant Hall, Senior Vice President, Federal Affairs, PhRMA to Rick Smith, Senior Vice President, Policy & Research, PhRMA, and Mimi Simoneaux Kneuer, Vice President, Government and Public Affairs, PhRMA (May 14, 2009, 23:46:32) (PhRMA Document Production 0002202).

³ E-mail from Kirsten Axelsen to Sandra Beaty (June 10, 2009, 19:24) (Pfizer Document Production 0010).

⁴ *Id.*

⁵ E-mail from Billy Tauzin, President, PhRMA, to James Messina, White House Deputy Chief of Staff (June 17, 2009, 12:14) (PhRMA Document Production 0000636).

obtained a good deal. The timing of this deal for PhRMA coincided with a politically bad week⁶ for the White House:

*From: Ken Johnson
To: Bryant Hall; Mimi Simoneaux Kneuer; Billy Tauzin
Sent: Thu Jun 18 20:07:08 2009
Subject: RE: Tomorrow*

We have a real problem. The White House has already leaked to the Washington Post that there will be an important announcement tomorrow with PhRMA. That makes me very nervous.

It's pretty clear that the Administration has had a horrible week on health care reform, and we are now getting jammed to make this announcement so the story takes a positive turn before the Sunday talk shows beat up on Congress and the White House. Maybe that buys us some love from them—that's your call.

But everyone just needs to understand why we are facing this "hurry-up, get-it-done now" timeline.

*My one other serious concern: once we go to this event, there is no turning back on the commitment even if health care reform tanks.*⁷

PhRMA's chief lobbyist for the deal replied: "We can't turn back. And yes, that's why they are doing it, but it's also why we got a good deal."⁸

The principals convened a meeting on July 7, 2009, to go over the terms. Details on the meeting were offered the next day: "Several PhRMA CEOs and PhRMA leadership met yesterday at the White House with Sen. Baucus, Senate staff, Rahm Emanuel, Nancy-Ann DeParle (the White House health care reform czar) and others."⁹ Pfizer CEO Jeffrey Kindler had described the purpose of such a meeting nearly a month earlier:

*From: Kindler, Jeffrey B.
Sent: Thursday, June 11, 2009 4:49 PM
To: Billy Tauzin
CC: David Brennan, Miles White, Rickard Clark, K. Sharer*

⁶ See Lori Montgomery, *Debate on Health-Care Reform Gets Started With Delay*, WASH. POST, June 18, 2009; see also Robert Pear & Jackie Calmes, *Cost Concerns as Obama Pushes Health Issue*, N.Y. TIMES, June 15, 2009, at A1.

⁷ E-mail from Ken Johnson, Senior Vice President, Public Affairs, to Bryant Hall, Mimi Simoneaux Kneuer, and Billy Tauzin (June 18, 2009, 20:07:08) (PhRMA Document Production 0002215).

⁸ E-mail from Bryant Hall to Ken Johnson, Mimi Simoneaux Kneuer, and Billy Tauzin (June 18, 2009, 20:11) (PhRMA Document Production 0002215).

⁹ E-mail from Sandra Beaty, Chief of Staff to the CEO of Pfizer (July 8, 2009, 19:21) (Pfizer Document Production 0008).

...

*An ideal end game would be a joint meeting to confirm any deal that we work out in a meeting with us and the principals (Emanuel, [Redacted]) early next week. Whether a deal fully sticks or not, we can't be sure, but I for one would like to look the other side in the eye and shake their hand on whatever deal we work out.*¹⁰

As Hall said: "It's just to go over the principal elements of the deal w Rahm, Messina, and DeParle. We haven't had a principals mtg since the deal was cut."¹¹

II. Negotiation Tactics: Threats and Reassurances

On May 11, 2009, as the White House worked to build momentum and generate support for health care reform, representatives from Advamed, the American Hospital Association, the American Medical Association, America's Health Insurance Plans, PhRMA, and the Service Employees International Union (SEIU) met at the White House. After this meeting, the President announced a commitment from these industries to cut \$2 trillion from the growth rate of national health care spending.

Three days after the meeting, *The New York Times* reported, "Hospitals and insurance companies said Thursday that President Obama had substantially overstated their promise earlier in this week to reduce the growth of health spending."¹²

PhRMA representatives braced for the White House to be "in full damage control mode, which I assume will mean go on the assault. . . ."¹³ The White House wanted a letter from the group that reiterated their willingness to pass health care legislation. PhRMA was hesitant to sign such a letter. The White House had no patience with PhRMA's hesitancy and made this known to PhRMA's top lobbyist:

From: Bryant Hall
Sent: Friday, May 15, 2009 1:09 PM
To: Mimi Simoneaux Kneuer; Rick Smith; Billy Tauzin; Diane Bieri; Ken Johnson
Subject: White House – pls read

¹⁰ E-mail from Jeffrey Kindler, CEO, Pfizer to Billy Tauzin (June 11, 2009, 16:49) (PhRMA Document Production 0002149).

¹¹ E-mail from Bryant Hall to Rodger Currie (July 6, 2009, 10:24) (PhRMA Document Production 0002162).

¹² Robert Pear, *Health Care Leaders Say Obama Overstated Their Promise to Control Costs*, N.Y. TIMES, May 14, 2009, at A20.

¹³ E-mail from Rick Smith to Bryant Hall and Mimi Simoneaux Kneuer (May 14, 2009, 23:53) (PhRMA Document Production 0002202).

Just called to say that the WH – specific Robert Gibbs and Rahm are very concerned that unless we have this statement out immediately, the entire WH press briefing will be dominated by the topic of the cost curve and what happened yesterday.

*We are the only ones not signing. I explained our rationale. They want us to sign.*¹⁴

Twenty minutes later, it was made clear that this was not an idle threat:

*From: Bryant Hall
Sent: Friday, May 15, 2009 1:27 PM
To: Rick Smith; Diane Bieri; Mimi Simoneaux Kneuer
Subject: Re: Urgent – Statement*

Taking Billy off. We need to sign it. Robert Gibbs is going to call PhRMA out specifically by name as an outlier at the press conference if we do not.

*Rahm is already furious. The ire will be turned on us.*¹⁵

Facing this threat, PhRMA signed the letter.¹⁶

The threat of public reprisal was a tactic employed by the White House more than once as it worked behind the scenes to squelch opposition to the legislation and eke out support. As described in an email following the June 10, 2009, principals meeting, PhRMA was expected to make a substantial financial contribution in the form of funding cuts and lost revenue to pay for the law: “They are looking for over 100B from the pharma industry.”¹⁷

The White House was pushing for a deal, and was willing to use the President to get it:

*From: Bryant Hall
To: Tom Moore
Sent: Wed June 10 21:29:40 2009
Subject: Re: Read*

Barack Obama is going to announce in his Saturday radio address support for rebating all of D unless we come to a deal. So they are punishing us for being forward leaning.

¹⁴ E-mail from Bryant Hall to Mimi Simoneaux Kneuer, Rick Smith, Billy Tauzin, Diane Bieri, Executive Vice President and General Counsel, PhRMA, and Ken Johnson (May 15, 2009, 13:09) (PhRMA Document Production 0002073).

¹⁵ E-mail from Bryant Hall to Rick Smith, Diane Bieri, and Mimi Simoneaux Kneuer (May 15, 2009, 13:27) (PhRMA Document Production 0002195).

¹⁶ Press Release, Joint Statement of AdvaMed, AHA, AHIP, AMA, PhRMA, and SEIU (May 15, 2009), <http://www.aha.org/content/00-10/090515-healthreform-joint-statement.pdf>.

¹⁷ E-mail from Kirsten Axelsen, *supra* note 3.

*It's laughable and they are burning bridges. They can't get 60 votes for that. It isn't even a real threat.*¹⁸

In this instance, the threat that President Obama would personally take on the pharmaceutical industry appears to have been intentional. In other cases, the White House's public attacks on its private negotiating partner seem to have been for show.

For example, an admonition that the industry should not take the President's criticisms to heart came amid this same discussion of whether the law would include rebates in the Medicare Part D (prescription drug coverage) program, a policy the industry opposed.

The White House had threatened to use the President's weekly radio address to call for rebates in Part D unless the pharmaceutical industry agreed to a deal. A June 12, 2009, email makes clear that the industry's "willingness to work within the indicated range" of cuts it would agree to shoulder was premised on the understanding that "the President would not...put Part D in play or otherwise offer new pharma pay-fors in tomorrow's radio address."¹⁹

Eventually the White House backed down and PhRMA prevailed: "the President's radio...address will not have any mention of part D...no mention or rebates and no mention of part D."²⁰ The address would have a mild mention of drug makers paying a fair share, but this was not a concern according to Hall:

From: Bryant Hall
Sent: Friday, June 12 2009 7:00 PM
To: Neal Comstock; Mimi Simoneaux Kneuer; Ken Johnson, Billy Tauzin
Subject: Background for Board

Obviously—below just context.

*Here's the stuff. Background is that the Pres's words are harmless. He knows personally about our deal and is pushing no agenda....*²¹

PhRMA knew that the President's statements to the American people about his efforts to produce health care reform legislation were, at this point, "harmless." The industry had secured its deal.

¹⁸ E-mail from Bryant Hall to Tom Moore, Vice President for Federal Affairs, PhRMA (June 10, 2009, 21:29:40) (PhRMA Document Production 0002152); *see also* E-mail from Bryant Hall to Tom Moore (June 10, 2009, 21:17:30) (PhRMA Document Production 2153) ("Nancy-Ann threatened to me the full rebate of Part D. I said 'no way.'")

¹⁹ E-mail from Jeffrey Kindler to Billy Tauzin (June 12, 2009, 10:54) (PhRMA Document Production 0002261).

²⁰ E-mail from Bryant Hall to Jeffrey Kindler and Billy Tauzin (June 12, 2009, 13:02) (PhRMA Document Production 0002261).

²¹ E-mail from Bryant Hall to Neal Comstock, Mimi Simoneaux Kneuer, Ken Johnson, and Billy Tauzin (June 12, 2009, 19:00:00) (PhRMA Document Production 0002218).

III. The Deal: Policy Decisions Made, Public Support Delivered

On July 7, 2009, the White House convened the aforementioned meeting between several PhRMA CEOs, PhRMA leadership, Senator Baucus and Senate staff, and key White House personnel, including Nancy-Ann DeParle and Rahm Emanuel. Internal industry documents describe the specifics of the discussion:

*The purpose of the meeting was to solidify the PhRMA agreement for support of the \$80 billion (over 10 years) to fund healthcare. There was candid discussion regarding issues of importance to us including importation, comparative effectiveness, follow on biologics, whether the PhRMA ‘payfor’ amount will remain the same if the overall health care reform package shrinks or increases, and challenges in keeping the House of Representatives bill language in alignment with the Senate – White House agreement.*²²

These details are spelled out explicitly in the PhRMA document summarizing the agreement the industry cut with the White House²³, a copy of which is attached to this memorandum.

“the \$80 billion agreement”

According to an internal summary of the deal, PhRMA agreed to contribute \$80 billion toward the cost of the health care law through various policies that would reduce industry earnings and increase costs. These policies included—

- A proposal to close the Medicare Part D “doughnut hole.” Pharmaceutical companies will pay half the cost of drugs in the coverage gap under Medicare Part D.
- An increase and expansion of the Medicaid rebate, the size and scope to be determined pending CBO scores.
- A Health Reform Fee, to be determined by CBO scores.

Notably, the agreement also guaranteed that many other policies would not be enacted: “the White House and Senator Baucus agreed that” —

- Price controls in Medicare Part D, repeal of non-interference, and the creation of a government-run Medicare Part D plan will not be included in a bill that is signed into law.
- The White House will oppose the [REDACTED] proposal to impose price controls in Medicare Part D on dual eligible beneficiaries to fund a further narrowing of coverage gap. CBO found this proposal would increase Medicare Part D premiums for all beneficiaries by about 50%.

²² E-mail from Sandra Beaty, *supra* note 9.

²³ PhRMA, *Talking Points*, n.d.. (PhRMA Document Production 0002281).

- Any savings from a Follow-on Biologics (FOBs) proposal signed into law as part of health reform will be applied to the total \$80 billion commitment from the industry, regardless of the underlying policy. There was no agreement on any policy regarding FOBs.²⁴

“WH is working on some very explicit language on importation to kill it in health care reform. This has to stay quiet.”

In addition to the policies bartered in and out of the legislation as part of the \$80 billion agreement affirmed on July 7, numerous email exchanges throughout the summer and fall explicitly link the White House position on drug importation to the pharmaceutical industry’s willingness to strike a deal:

*From: DeParle, Nancy-Ann M.
To: Bryant Hall
CC: Singlser, Dana E.
Sent: Wed Jun 03 10:33:15 2009*

Yes -- I pushed this, everyone (Messina, Rahm) is in Egypt w POTUS but Phil Schilliro, Dana Singlser and I made decision, based on how constructive you guys have been, to oppose importation on this bill. It is my understanding that this is being conveyed—let me know if that is not the case.²⁵

PhRMA’s chief lobbyist for the deal negotiations quickly relayed this news:

*From: Bryant Hall
Sent: Wednesday, June 03, 2009 11:30 AM
To: Nicoli, David P; Davis, Chip; Buckley, Richard E.
Subject: Re: Revenue Raisers*

...

Nancy-Ann DeParle just called to say that the WH is opposing import on this bill, specifically linking to our willingness to be cooperative on HCR.²⁶

The White House continued its fight against importation on PhRMA’s behalf well into the fall:

*From: Bryant Hall
Sent: Thursday, September 17, 2009 6:05 PM*

²⁴ *Id.*

²⁵ E-mail from Nancy-Ann DeParle, Director, White House Office of Health Reform, to Bryant Hall (June 3, 2009, 10:33:15) (PhRMA Document Production 0002143).

²⁶ E-mail from Bryant Hall to David Nicoli, Chip Davis, and Richard Buckley (June 3, 2009, 11:30) (PhRMA Document Production 0002250).

To: Sally Susman; Jeff Kindler

...

Had a good call w Messina. Two things:

1) Working to kill [REDACTED] amdt. I had two candid conversations with his chief of staff tonight. Got him thinking about the cons of this.

Messina is calling [redacted] tmrw. He plans to be very blunt w him. I think we will be ok. [Redacted] is working him too.

2) Confidential: WH is working on some very explicit language on importation to kill it in health care reform. This has to stay quiet.²⁷

A month later, Hall reported the White House was still backing PhRMA:

From: Bryant Hall

Sent: Monday, October 12, 2009 5:52 PM

To: Jeff Kindler; Sally Susman

Subject: Re:

And they have something pretty nice cooked up on importation. But they want to keep it really quiet.²⁸

“the industry provides the majority of financial support for positive TV ads advocating passage of health reform”

The final section of PhRMA’s summary of the deal is dedicated to advertising. It references three PhRMA advertising initiatives: Healthy Economy Now, a 501(c)(4) established to advocate for the law’s passage; Harry and Louise, an ad campaign run jointly with Families USA; and a series of TV ads regarding an expansion of the Children’s Health Insurance Program.

The existence of a multimillion-dollar advertising campaign in support of health care legislation was reported in 2009, but the connection to the deal cut with the White House was explicitly denied, as reported by *Politico*:

At a meeting last April with corporate lobbyists, aides to President Barack Obama and Sen. Max Baucus (D-Mont.) helped set in motion a multimillion-dollar advertising campaign, primarily financed by industry

²⁷ E-Mail from Bryant Hall to Sally Susman and Jeffrey Kindler (Sept. 17, 2009, 18:05) (PhRMA Document Production 0002241).

²⁸ E-Mail from Bryant Hall to Jeffrey Kindler and Sally Susman (Oct. 12, 2009, 17:52) (PhRMA Document Production 0002240).

groups, that has played a key role in bolstering public support for health care reform.

*The role Baucus's chief of staff, Jon Selib, and deputy White House chief of staff Jim Messina played in launching the groups was part of a successful effort by Democrats to enlist traditional enemies of health care reform to their side. No quid pro quo was involved, they insist, as do the lobbyists themselves.*²⁹

Reports from PhRMA's Federal Integrated Advocacy Campaign Governance Committee – obtained through this investigation – appear to contradict claims that the advertising was not financed in exchange for the policy agreements. In a July 14, 2009, update to PhRMA's Board of Directors, the group stated: "As part of our agreement, PhRMA needs to undertake a very significant public campaign in order to support policies of mutual interest to the industry and the Administration/Baucus."³⁰

Conclusion

The Committee began its investigation into closed-door health care negotiations more than a year ago in an effort to shine light on a process that excluded both the American people and many of their elected representatives. Despite the White House's unwillingness to make these negotiations transparent, even after the fact, this Committee's investigation has uncovered a series of emails and internal documents that paint a much clearer picture of the tools and tactics used by the Obama Administration to secure a narrow, partisan victory and see PPACA signed into law.

As a candidate, President Obama routinely promised to televise all health care negotiations.³¹ Once in office, he hailed his efforts at combating special interests, and even recorded a Radio Address two months before the passage of PPACA about "fighting for the public against special interests."³² Candidate Obama was especially critical of the role of the pharmaceutical industry, cutting a television commercial in which he criticized the very same head of PhRMA with whom his Administration would cut a secret deal one year later.³³

This investigation examines the President's promises of transparency before, during, and after enactment of the legislation and compares them to the process his top operatives used to craft one of the most consequential laws enacted in recent memory. Documents obtained

²⁹ Ben Smith & Kenneth P. Vogel, *Dem officials set stage for corporate-backed health care campaign*, POLITICO, Oct. 16, 2009, <http://dyn.politico.com/printstory.cfm?uuid=5AC955BE-18FE-70B2-A8E44DE7927D15EA>.

³⁰ Letter from Theodore M. Hester, Partner, King & Spalding LLP to Fred Upton, Chairman, U.S. House of Representatives Energy & Commerce Comm. (May 11, 2012) (Excerpt from the Report on Health Care Reform to the Federal Integrated Advocacy Campaign Governance Committee, July 14, 2009).

³¹ See <http://www.politifact.com/truth-o-meter/promises/obameter/promise/517/health-care-reform-public-sessions-C-SPAN/>.

³² President Barack Obama, *Weekly Address: Fighting for the Public Against Special Interests* (Jan. 23, 2010) <http://www.whitehouse.gov/photos-and-video/video/weekly-address-fighting-public-against-special-interests>.

³³ See [PRES] Obama: Billy, YOUTUBE (Apr. 9, 2008) <http://www.youtube.com/watch?v=NCRO0g9CfAw>

through the investigation confirm the existence of a deal between the White House and PhRMA. The deal included explicit policy commitments, affirmed in a closed-door meeting at the White House on July 7, 2009.

In its summary of the agreement, PhRMA outlined a series of advertising campaigns it would undertake in support of health care reform legislation – a topic the committee intends to examine in greater detail. And in its review of the tactics used by the White House, the investigation identified a potent combination of policy threats and private reassurances that industry would be protected against policies it disliked in exchange for support of the legislation and acceptance of other policies. Taken together, these findings help illuminate a previously opaque series of agreements that resulted in a fundamental reshaping of our nation's health care system.